Petition

81-742

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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

ERNEST DONALD SUGGS,

Petitioner

v.

STATE OF ALABAMA,

Respondent

Petition for a Writ of Certiorari
To the Supreme Court of Alabama

JOE R. WHATLEY, JR.
JOHN C. FALKENBERRY
DONALD W. STEWART

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QUESTIONS PRESENTED

1. Was petitioner denied due process of law when, notwithstanding an appropriate request, the prosecutor failed or refused to give to petitioner exculpatory information contained in a medical report which was in the possession of the police?

2. Was petitioner denied due process of law by the Trial Court's jury instruction which could have created the impression with the jury that the burden of persuasion on the issue of self-defense was on petitioner, rather than on the State?

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IN THE

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October Term, 1981

No.

ERNEST DONALD SUGGS,
Petitioner

v.

STATE OF ALABAMA,
Respondent

Petition for a Writ of Certiorari
To the Supreme Court of Alabama

OPINIONS BELOW

The opinion of the Circuit Court for the Seventh Judicial Circuit of Alabama entered July 18, 1979 is not reported but is reprinted at App. 1 - 5 (pages 1 - 5 of the Appendix to this petition.) The opinion of the Alabama Court of Criminal Appeals issued May 5, 1981, is reported at ..... So.2d ..... and is reprinted at App. 6 - 13. The Supreme Court of Alabama denied petitioner's petition for a writ of certiorari without opinion on August 21, 1981.

JURISDICTION

On May 5, 1981, the Alabama Court of Criminal Appeals affirmed both petitioner's conviction for murder and the accompanying sentence of life imprisonment. Petitioner

filed a motion for rehearing, which was denied on June 23, 1981. Petitioner then filed a petition for writ of certiorari in the Supreme Court of Alabama, which was denied on August 21, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

QUESTIONS PRESENTED

1. Was petitioner denied due process of law when, notwithstanding an appropriate request, the prosecutor failed and refused to give to petitioner exculpatory information contained in a medical report which was in the possession of the police?
2. Was petitioner denied due process of law by the Trial Court's jury instruction which could have created the impression with the jury that the burden of persuasion on the issue of self-defense was on petitioner, rather than on the State?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> "SECTION I. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, Ernest Donald Suggs, was indicted for murder by the Grand Jury of Calhoun County, Alabama. He

pleaded not guilty. His trial began on February 12, 1979, in the Seventh Judicial Circuit of Alabama. On February 15, 1979, the jury found him guilty and sentenced him to life imprisonment. He gave notice of appeal to the Alabama Court of Criminal Appeals and filed a motion for new trial, which was amended on several occasions. This motion was denied on July 18, 1979 (App. p. 11). On May 5, 1981, in an opinion consisting primarily of a recitation of the Trial Court's decision, the Alabama Court of Criminal Appeals affirmed petitioner's conviction. Petitioner then filed a motion for rehearing, which was denied on June 23, 1981. He next filed a petition for a writ of certiorari in the Alabama Supreme Court on July 7, 1981. That petition was denied on August 21, 1981.

REASONS FOR GRANTING THE WRIT

1. Petitioner was Denied Due Process of Law Because After an Appropriate Request, the Prosecutor Failed and Refused to Give Petitioner Exculpatory Information Contained in a Medical Report Which was in the Possession of the Police.

Prior to the trial of this case, the petitioner filed a motion to produce (R. 629)[1] which encompassed a medical report concerning Kathy Robb, the key prosecution witness. (R. 727-R). At trial, a city detective testified that the police had a document (Tr. 443 & 444),[2] which contained exculpatory information. This medical report revealed that Robb had powder burns on her cheeks, a fact that was inconsistent with her description of the incident involved in this case. Also, the report stated that Robb felt guilty about

[1] "R." refers to the pagination of the Record on Appeal in the Alabama Court of Criminal Appeals.

[2] "Tr." refers to the pagination of the court reporter's transcript of the trial proceedings.

the incident, a fact which supported petitioner's testimony about Robb's voluntary contact with him. Nevertheless, as then attorney and now United States District Judge Robert Propst testified (Tr. 569), that exculpatory information was not supplied to petitioner, and petitioner was not aware of it at the commencement of the trial.

In *Brady v. Maryland*, 373 U.S. 83 (1963), this Court held that the principles of due process require a prosecutor to provide a defendant with any evidence which would tend to exculpate him, if the defendant makes a request for such information. Accord: *Mooney v. Holohan*, 294 U.S. 103 (1935); *Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980). As this Court explained in *Brady, supra*, a criminal defendant cannot receive a fair trial consistent with due process of law, unless the prosecutor complies with his obligation to turn over exculpatory information to the defendant. Here, the prosecutor violated his obligation to petitioner, petitioner was thereby denied due process of law and, accordingly, petitioner's conviction should be reversed.

It is important to note that although petitioner has made this argument at every level of these proceedings, the Alabama appellate courts have refused even to address the issue despite the plain violation of petitioner's rights under *Brady v. Maryland, supra*. In order to give petitioner a fair and complete appellate review and to insure due process, this Court should grant certiorari to consider this serious issue.

2. Petitioner was Denied Due Process of Law Because the Trial Court's Jury Instruction Which Could Have Left the Impression With the Jury That the Burden of Persuasion on the Issue of Self-Defense was on Petitioner Rather Than on the State.

The Trial Court instructed the jury that "it is never presumed that an unlawful homicide is committed in the right

of self-defense . . ." (App. 14). In its charge, the Trial Court never made any attempt to assure the jury that the burden of persuasion is never on the defendant to make out a case of self-defense.

The United States Court of Appeals for the Fifth Circuit has recently held that it is unconstitutional to place upon the defendant the burden of persuasion on the issue of self-defense. *Holloway v. McElroy,* 632 F.2d 605 (5th Cir. 1980), *cert. den.,* ..... U.S. ....., 49 U.S.L.W. 3881 (May 26, 1981). Here, as in *Holloway,* based on the Trial Court's instruction "a reasonable juror could well have believed that the burden was on the defendant to make . . ." a case of self-defense. Thus, petitioner argued in brief to the Supreme Court of Alabama, the conviction should be reversed.

As demonstrated by Mr. Justice Rehnquist's dissent from the denial of certiorari in *Holloway v. McElroy,* 49 U.S. L.W. 3881, the relationship between the requirements of due process and burden of proof needs further clarification. The Court should take this opportunity to analyze the decisions in this area (*Leland v. Oregon,* 343 U.S. 790 (1952); *In re Winship,* 397 U.S. 358 (1970); *Rivera v. Delaware,* 429 U.S. 877 (1976); *Patterson v. New York,* 432 U.S. 197 (1977)), and then to issue a decision clarifying the law.

CONCLUSION

Petitioner respectfully submits that for the reasons stated by Mr. Justice Rehnquist's dissent in *Holloway, supra*, this Court should grant certiorari to review this case, and for the reasons left unstated by a majority of this Court, the conviction should be reversed.

Respectfully submitted,

JOE R. WHATLEY, JR.
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APPENDIX

ORDER: MOTION FOR NEW TRIAL OVERRULED

State of Alabama	)	In The Circuit Court of
Vs.	)	Calhoun County, Alabama
Ernest Donald Suggs,	)	Case No. CC 78-578
Defendant.	)	

ORDER

The defendant's motion for a new trial, as amended, is submitted on the evidence presented through July 3, 1979, in open Court, jury questionnaires received by the Court outside of presence of Counsel by agreement of Counsel, arguments and briefs of the attorneys and upon consideration thereof the Court finds:

1. That the evidence and law support the verdict of the jury.

2. There is no evidence to support the allegation that a juror slept or was inattentive during the trial. The Court, during the course of this trial, also, from time to time, observed the jury and did not observe any juror sleeping or inattentive.

3. There is no evidence that a juror had resided in Calhoun County for less than the last twelve (12) months.

4. One juror had been convicted of assault and battery in Calhoun County Court on a warrant sworn out by his wife, the alleged victim. Section 182 of Article VIII of the Constitution of Alabama lists disqualifications from registering and voting, many are violative of the United States Constitution and therefore are invalid. One is assault and battery on a wife. This cannot be considered any longer as a disqualification to register and vote. See *Hopson v. Pow*, 434 F.Supp. 362.

5. On voir dire examination of the jury by the State of Alabama the venire was asked whether any jurors "had ever

been associated or connected with anyone that had been involved in a criminal case." One juror's son was involved in a "hub cap" case which was more than ten (10) years ago but he did not respond to the question. The Court considers this remote and no prejudice to the defendant has been shown.

6. The Court qualified the venire by asking the following question: "Has anyone of you ever lost the right to vote as a result of conviction of a crime involving moral turpitude? Moral turpitude generally means a crime punishable by imprisonment in the state penitentiary, but includes any crime contrary to honesty, justice, and good morals." No juror responded to this question. One Juror, who served on this case, in 1977, has been convicted of petite larceny in the Recorders Court of the City of Anniston. It has long been held that convictions in Municipal or Recorders Courts are not crimes involving moral turpitude.

Norris v. State, 229 Ala. 226

Parker v. State, 280 Ala. 685

Higgins v. State, 271 Ala. 428

The Recorders Court of the City of Anniston had only the jurisdiction to enforce its ordinances at the time of the conviction.

The Court is of the opinion the juror answered the question correctly. He has never been removed from the voting rolls of Calhoun County. This juror and the defendant's father have been acquaintances for more than fifteen years and it is inconceivable that this was not known to the defendant and his attorneys prior to trial as defendant's father retained the defendant's counsel. Calhoun County does not have "secret venires" and the jury list was available to the attorneys at least two weeks prior to trial. No prejudice to the defendant has been shown.

7. Defendant alleges that a juror was deaf and cannot read or write. This has not been shown by the evidence and in court and on this hearing the juror appears to the Court to have sufficient hearing, reading and writing ability to qualify for jury service.

8. There is no evidence to support the contention the jury venire was selected or chosen contrary to law. Also, see: *Manson v. State*, 349 So.2d.

9. The defendant further claims the Court erred in excluding from the Rule, Mr. Hakes, father of the deceased who sat at the counsel table with the State's attorney during the trial. The assistant District Attorney asked that Mr. Hakes be excused from the Rule which the Court granted. The Court does not find this to be an abuse of discretion and the State is entitled such request. The defendant has failed to show any prejudice in the trial of this case due to Mr. Hakes' presence in the Courtroom nor any abuse of discretion by the Court. It is within the discretion of the Court to excuse a witness from the 'Rule' and consent of the defendant is not necessary. Mr. Hakes only came to tears one time while he was on the witness stand testifying.

10. During the trial the female companion of deceased, while testifying, became emotionally distressed and Court had to be adjourned for her to regain her composure. She retired to the only witness room and her mother and the mother of the deceased went into said room to comfort her. Part of this occurred in the presence of the Trial Judge. Nothing prejudicial to the defendant has been shown by this event. Defendant has failed to show any prejudice to Defendant or impropriety on the part of any State witness.

11. Jurors were allowed to separate by agreement with the State and Defendant, which was made in writing prior to trial, and the defendant has not shown any prejudice from this occurrence.

12. Defendant alleges that it was error to refuse his requested charge #14 which was marked "refused" by the Court. The Court is of opinion this charge was adequately covered in its oral charge and by requested charges #20 and #21 which were given.

13. There is no evidence to support the allegation that the Jury Commission of this County systematically excluded persons over sixty-five (65) years of age and the Court has personally seen many jurors over sixty-five (65) years of age in jury panels since the new jury box has been filled under the jury law enacted in May of 1978.

14. In regard to the twentieth ground of defendant's motion for a new trial the telephone tape of the City of Anniston concerning the day of this incident was reused and not available at the time defendant brought this to the Court's attention. Nothing inculpatory or exculpatory has been alleged or shown to have been on this tape and no prejudice to the defendant has been shown. The weapons turned into police by defendant and his father appear to be the only weapons at the scene of the incident and none were found by the police. All physical evidence has been shown to the defendant at his request and only marijuana, which was apparently the defendant's, was found by the police. The statement of Cathy Robb was given to defendant prior to trial and there is no evidence a drawing was made by Ms. Robb and therefore could not have been withheld by the State.

15. The statement by the prosecuting attorney "Leslie Hakes was executed by the defendant" was proper argument in his final argument and a comment on a reasonable inference from the facts of the case as presented in Court.

16. Photographs of murder victims and scenes are admissible to shed light upon the material inquiry and were

particularly helpful due to the conflicting evidence presented.

17. The political ad of now Judge Nat Owens was publicized in August of 1978. This trial occurred in February, 1979. Nothing has been shown prejudicial to defendant from this ad.

18. There is no evidence to support ground no. 25 of defendant's motion nor has there been an offer to do so.

19. The voir dire questions in ground no. 25 and 26 were not illegal questions and might have assisted the State in selection of jurors if affirmative answers had been given.

20. The voir dire question in ground no. 28 is a valid inquiry by the State.

21. There is no evidence or offer thereof to support ground no. 30 of said motion.

22. The defendant has not shown any prejudice from error in State's report by Dr. Embry where the blanching on the face of deceased was described as being on one side of the face and Dr. Embry in his testimony described it correctly as being on the other side of the face which was the side on the ground.

The blood stains on the side of the truck were stated to be on the left side in the police report and the police officer meant left side while facing the vehicle which he testified on the stand as the "passenger side". No prejudice to the defendant has been shown.

It is therefore ORDERED and ADJUDGED by the Court that defendant's motion for new trial be and it hereby is overruled.

Done and ORDERED this 18th day of July, 1979.

/s/ Robert M. Parker

Circuit Judge

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1980-81

7 Div. 670

Ernest Donald Suggs

v.

State

Appeal from Calhoun Circuit Court

HARRIS, PRESIDING JUDGE

Appellant was convicted of murder in the first degree and the jury fixed his punishment at life imprisonment. Throughout the trial proceedings he was represented by retained counsel who represent him on this appeal. At arraignment, in the presence of his attorneys, he pleaded not guilty. After sentence was imposed he gave notice of appeal.

The pertinent facts leading up to the fatal shooting of the deceased are set forth in the opinion in *Suggs v. State*, 7 Div. 692, Ala.Cr.App. Ms. released this date. In that cause, which grew out of the same incident as the one here under consideration, appellant was convicted of assault with intent to murder the companion of the deceased of the same incident. For a more definitive statement of the facts involved in the murder conviction reference is made to the opinion involving the assault with intent to murder conviction in which appellant was sentenced to fifteen years imprisonment in the penitentiary and which sentence was made concurrent with the life sentence he received following the murder conviction.

In the murder conviction appellant raised several issues which were not involved in the conviction for assault with intent to murder. Most of these issues were first raised in

his motion for a new trial and much evidence was heard in the hearing on that motion. At the conclusion of the hearing on the motion for a new trial the trial court made a written order denying the motion. The order reads as follows:

"ORDER: MOTION FOR NEW TRIAL OVERRULED

"State of Alabama	)	In the Circuit Court of
Vs.	)	Calhoun County, Alabama
Ernest Donald Suggs,	)	Case No. CC 78-578
Defendant.	)	
		Filed 7-18-79

ORDER

"The defendant's motion for a new trial, as amended, is submitted on the evidence presented through July 3, 1979, in open court, jury questionnaires received by the Court outside of presence of Counsel by agreement of Counsel, arguments and briefs of the attorneys and upon consideration thereof the Court finds:

"1. That the evidence and law support the verdict of the jury.

"2. There is no evidence to support the allegation that a juror slept or was inattentive during the trial. The Court, during the course of this trial, also, from time to time, observed the jury and did not observe any juror sleeping or inattentive.

"3. There is no evidence that a juror had resided in Calhoun County for less than the last twelve (12) months.

"4. One juror had been convicted of assault and battery in Calhoun County Court on a warrant sworn out by his wife, the alleged victim. Section 182 of Article VIII of the Constitution of Alabama lists disqualifications from registering and voting, many are violative of the United States Constitution and therefore are invalid. One is assault and battery on a wife. This can-

not be considered any longer as a disqualification to register and vote. See *Hopson v. Pow*, 434 F.Supp. 362.

"5. On voir dire examination of the jury by the State of Alabama the venire was asked whether any jurors 'had ever been associated or connected with anyone that had been involved in a criminal case.' One juror's son was involved in a 'hub cap' case which was more than ten (10) years ago but he did not respond to the question. The Court considers this remote and no prejudice to the defendant has been shown.

"6. The Court qualified the venire by asking the following question: 'Has anyone of you ever lost the right to vote as a result of conviction of a crime involving moral turpitude? Moral turpitude generally means a crime punishable by imprisonment in the state penitentiary, but includes any crime contrary to honesty, justice, and good morals.' No juror responded to this question. One juror, who served on this case, in 1977, has been convicted of petit larceny in the Recorder's Court of the City of Anniston. It has long been held that convictions in Municipal or Recorder's Courts are not crimes involving moral turpitude.

Norris v. State, 229 Ala. 226
Parker v. State, 280 Ala. 685
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"The Recorder's Court of the City of Anniston had only the jurisdiction to enforce its ordinances at the time of the conviction.

"The Court is of the opinion the juror answered the question correctly. He has never been removed from the voting rolls of Calhoun County. This juror and the defendant's father have been acquaintances for more than fifteen years and it is inconceivable this was not known to the defendant and his attorneys prior to trial as defendant's father retained the defendant's counsel. Calhoun County does not have 'secret venires' and the jury list was available to the attorneys at least two weeks prior to trial. No prejudice to the defendant has been shown.

"7. Defendant alleges that a juror was deaf and cannot read or write. This has not been shown by the evidence and in court and on this hearing the juror appears to the Court to have sufficient hearing, reading and writing ability to qualify for jury service.

"8. There is no evidence to support the contention the jury venire was selected or chosen contrary to law. Also, see: *Manson v. State*, 349 So.2d 67.

"9. The defendant further claims the Court erred in excluding from the Rule, Mr. Hakes, father of the deceased who sat at the counsel table with the State's attorney during the trial. The assistant District Attorney asked that Mr. Hakes be excused from the Rule which the Court granted. The Court does not find this to be an abuse of discretion and the State is entitled such request. The defendant has failed to show any prejudice in the trial of this case due to Mr. Hakes' presence in the Courtroom nor any abuse of discretion by the Court. It is within the discretion of the Court to excuse a witness from the 'Rule' and consent of the defendant is not necessary. Mr. Hakes only came to tears one time while he was on the witness stand testifying.

"10. During the trial the female companion of deceased, while testifying, became emotionally distressed and Court had to be adjourned for her to regain her composure. She retired to the only witness room and her mother and the mother of the deceased went into said room to comfort her. Part of this occurred in the presence of the Trial Judge. Nothing prejudicial to the defendant has been shown by this event. Defendant has failed to show any prejudice to Defendant or impropriety on the part of any State witness.

"11. Jurors were allowed to separate by agreement with the State and Defendant, which was made in writing prior to trial, and the defendant has not shown any prejudice from this occurrence.

"12. Defendant alleges that it was error to refuse his requested charge #14 which was marked 'refused' by

the Court. The Court is of opinion this charge was adequately covered in its oral charge and by requested charges #20 and #21 which were given.

"13. There is no evidence to support the allegation that the Jury Commission of this County systematically excluded persons over sixty-five (65) years of age and the Court has personally seen many jurors over sixty-five (65) years of age in jury panels since the new jury box has been filled under the jury law enacted in May of 1978.

"14. In regard to the twentieth ground of defendant's motion for a new trial the telephone tape of the City of Anniston concerning the day of this incident was reused and not available at the time defendant brought this to the Court's attention. Nothing inculpatory or exculpatory has been alleged or shown to have been on this tape and no prejudice to the defendant has been shown. The weapons turned into police by defendant and his father appear to be the only weapons at the scene of the incident and none were found by the police. All physical evidence has been shown to the defendant at his request and only marijuana, which was apparently the defendant's, was found by the police. The Statement of Cathy Robb was given to defendant prior to trial and there is no evidence a drawing was made by Ms. Robb and therefore could not have been withheld by the State.

"15. The statement by the prosecuting attorney 'Leslie Hakes was executed by the defendant' was proper argument in his final argument and a comment on a reasonable inference from the facts of the case as presented in Court.

"16. Photographs of murder victims and scenes are admissible to shed light upon the material inquiry and were particularly helpful due to the conflicting evidence presented.

"17. The political ad of now Judge Nat Owens was publicized in August of 1978. The trial occurred in

February, 1979. Nothing has been shown prejudicial to defendant from this ad.

"18. There is no evidence to support ground no. 25 of defendant's motion nor has there been an offer to do so.

"19. The voir dire questions in ground no. 25 and 26 were not illegal questions and might have assisted the State in selection of jurors if affirmative answers had been given.

"20. The voir dire question in ground no. 28 is a valid inquiry by the State.

"21. There is no evidence or offer thereof to support ground no. 30 of said motion.

"22. The defendant has not shown any prejudice from error in State's report by Dr. Embry where the blanching on the face of deceased was described as being on one side of the face and Dr. Embry in his testimony described it correctly as being on the other side of the face which was the side on the ground.

"The blood stains on the side of the truck were stated to be on the left side in the police report and the police officer meant left side while facing the vehicle which he testified on the stand as the 'passenger side'. No prejudice to the defendant has been shown.

"It is therefore ORDERED and ADJUDGED by the Court that defendant's motion for new trial be and it hereby is overruled.

"Done and ORDERED this 18th day of July, 1979.

/s/ ROBERT M. PARKER
Circuit Judge"

This is a bizarre case. After appellant shot and killed Leslie Hakes and wounded Kathy Robb only two witnesses were left to tell the jury what actually occurred at the scene of this conflicting crime, (appellant and Robb). Their testimonies were in sharp conflict as to the shooting and the physical facts. Robb gave one version and appellant gave

another. Appellant claimed the shooting was accidental and Robb contended the shooting was a deliberate act. Appellant claimed that he did not intend to shoot the deceased and did not know that Kathy Robb had been shot. Appellant did admit that while he was running into the woods he turned around and intentionally fired his pistol in the direction of the deceased and that he fired several times.

Conflicting evidence is always a question for the jury to determine, and a verdict rendered thereon will not be disturbed on appeal. *Waters v. State,* Ala.Cr.App., 318 So.2d 342; *Vines v. State,* Ala.Cr.App., 326 So.2d 307; *Woods v. State,* Ala.Cr.App., 344 So.2d 1225; *Young v. State,* Ala.Cr. App., 346 So.2d 509.

It is not within the province of the Court of Criminal Appeals to pass judgment on the truthfulness or falsity of conflicting evidence. *Young v. State,* Ala.Cr.App., 346 So. 2d 509; *Williams v. State,* Ala.Cr.App., 348 So.2d 1142.

Circumstantial evidence may afford satisfactory proof of the corpus delicti in a murder prosecution. If facts are presented from which the jury may reasonably infer that the crime has been committed the question must be submitted to the jury and the other evidence tending to implicate the defendant is thereby rendered admissible. *Davis v. State,* Ala.Cr.App., 331 So.2d 813; *Hoback v. State,* Ala.Cr.App., 338 So.2d 439; *Scroggins v. State,* Ala.Cr.App., 341 So.2d 967.

In *Young v. State,* 283 Ala. 676, 220 So.2d 843, the Supreme Court held:

> "Where the evidence presented raises questions of fact for the jury, and such evidence, if believed, is sufficient to sustain conviction, the denial of a motion to exclude the state's evidence, the refusal to give the affirmative charge and the overruling of a motion for new trial, do not constitute error. . . ."

We are in full accord with the findings of the trial court in his written order overruling the motion for a new trial. The evidence was more than sufficient to sustain the verdict of the jury in finding appellant guilty of murder in the first degree.

We have carefully searched the four-volume record in this case for errors injuriously affecting the substantial rights of appellant and have found none. The judgment of conviction is affirmed.

AFFIRMED.

All the Judges concur, except Bookout, J., not sitting.

EXCERPTS FROM JURY INSTRUCTIONS

* * *

The defendant has pled not guilty and introduced some evidence to show that the alleged killing was done in self defense. Therefore, I want to discuss the law of self defense with you. It is said that neither divine nor human law requires us to love our neighbor better than ourselves; and the law permits every person who is without fault in bringing on the difficulty and who has adopted every reasonably safe expedient to avert the necessity to take the life of his assailant rather than to lose his own.

It may be said generally, and I shall presently state it for you in more detail, that before the law will justify or excuse a homicide under a plea of self defense, the jury trying the person asserting such plea must believe that such person did not himself intentionally do or say anything to provoke or encourage the fatal difficulty; that he was or appeared to be so menaced at the time as to create a reasonable apprehension of danger to his life or of great bodily harm, and that apparently there was no other reasonable mode of escape from such impending peril without increasing that peril.

Ladies and Gentlemen, it is never presumed that an unlawful homicide is committed in the right of self defense; therefore, a person who asserts self defense takes upon himself the duty of offering some evidence that there was a present impending peril, either actual or reasonably apparent to his life or danger or his receiving great bodily harm at the time he struck the fatal blow or fired the fatal shot, and also, unless he stays on his own premises, some evidence that at the time he actually or apparently had no reasonable known mode of escape without increasing his peril, unless the evidence offered by the State showing the killing also supplies such evidence. He is never under any duty to offer

any evidence to show that he was free from fault or to show that he did not provoke the difficulty except as it may become necessary to meet evidence which is offered by the State to show that he was not free from fault or to show that he did provoke the difficulty.

If after listening to all the evidence in a case a jury has a reasonable doubt as to whether or not at the time the fatal shot was fired there was a present impending peril to a slayer's life or danger of great bodily harm to him, either real or reasonably apparent, or as to whether the slayer could reasonably have retreated by a way known to him without increase, or apparent increase, of his peril, it would be the duty of that jury to acquit such slayer on his plea of self defense, unless that jury was convinced beyond a reasonable doubt and to a moral certainty that such slayer was not free from fault in bringing on the fatal difficulty.

Now, as I have said previously, there are three elements of the law of self defense, and all three of them must coexist at the time the fatal shot is fired in order for one to successfully invoke the law of self defense. If any of these three elements is absent, then a person may not slay in self defense. I am going to discuss them with you a little more in detail one at a time.

The first element of the plea of self defense is freedom from fault. Freedom from fault is an essential of the doctrine of self defense; and this means that one must be wholly free from fault in provoking the fatal difficulty. It has always been an elementary principal of the criminal law in our state that one who intentionally provokes a difficulty, who willingly enters into a fight that results in the death of another, who by his own wrong contributes to the situation out of which arises the necessity to take the life of another to preserve his own, cannot invoke the doctrine of self defense to justify the homicide he commits in such a difficulty.

The law will not permit a defendant to successfully plead a necessity to kill when that necessity arose from the defendant's own wrong. He who kills a human being, to be justified, must be mindful of his words and acts which are likely to produce a deadly combat and if by his intentional words, acts, or deeds he shows a willingness to enter a fatal conflict or invites it, he will be held in the eyes of the law to have produced the necessity of slaying his adversary and the law will not permit him to take shelter behind a plea of self defense, even though at the time he fired the fatal shot or struck the fatal blow, he was in imminent danger of losing his own life or of suffering great bodily harm and had no means of retreat open to him without increasing the peril to his own life or limb.

The second essential element of the law of self defense is that at the time of the homicide, that an accused relying on a plea of self defense not only believed, but also had reasonable grounds for believing that he was in imminent or immediate danger of losing his life or of suffering great bodily harm from his assailant or assailants. The danger must be imminent, impending and pending, and not prespective or even in the near future, and it must be either real or so apparent as to create a reasonable belief by an accused in the bona fide necessity for taking life in order to save his own. It is not sufficient that an alleged deceased had the means at hand to effect a deadly purpose, or that an accused reasonably believed such deceased had such means at hand to effect such purpose. To be sufficient, an alleged deceased must have indicated by some act or demonstration at the time of the killing a present intention to carry out and commit an assault involving death or great bodily harm to an accused and this act or demonstration must have been of such nature as to induce a reasonable belief on the part of an accused slayer that it was necessary for him to deprive

the alleged deceased of his life in order to save his own, and if the evidence shows no such act or demonstration, such killing cannot be justified on the law of self defense. A person has a right to act on the appearance of things at the time, taken in light of all the circumstances. If the circumstances attending a killing are such as to justify a reasonable man in the belief that he was in danger of great bodily harm or of death, and that he could not retreat without adding to his peril and he honestly believed such to be the case, then, if he was free from fault in bringing on the difficulty as I explained to you before, he has the right to take life in his own defense although as a matter of fact he was not in actual danger, and retreat would not increase or endanger his safety.

The third element of the law of self defense is what we commonly call the doctrine of retreat.

It is the law that no one is excused from taking human life if with safety to his own person he could have retired from the combat. Our Alabama law of homicide does not consider the doctrine of retreat a cowardly doctrine. It provides no balm or protection for wounded pride or honor in declining combat, or sense of shame in being denounced as cowardly. The law declares that one must flee rather than that another should die. And although retreat may not place a person in less peril or on better vantage ground than before, still this does not excuse him from the performance of this duty to retreat. However, the law only requires a man to retreat when he can safely do so without increasing his peril. If a man had a known reasonable mode of escape without danger to himself, and could have avoided taking life by using such escape without danger, then he was not in imminent peril, either real or apparent. However, unless this mode of escape was known or apparent to the slayer, and the circumstances were such that he could

avail himself of it without increasing his peril, then it could not be said that he had a reasonable mode of escape without danger. Now, this duty to retreat, to retire from the combat, arises when it appears necessary to do so in order to prevent the taking of human life, and when it can be done without apparently increasing the peril to the life or limb of the party assailed. Then, Ladies and Gentlemen, the slayer is under a duty to retreat, or the person under assault is under a duty to retreat.

Now, if, as these elements have been explained to you, a man is at fault in bringing on the fatal difficulty, or is not in imminent peril, or can retreat without increasing his peril, he cannot invoke the protection of the law of self defense. Now, Ladies and Gentlemen, this is all a question of fact for you to determine in this case. You must go to the Jury Room and decide what the true facts are. When you decide what the facts are, apply them to the law and definition of Murder in the First Degree, Murder in the Second Degree and Manslaughter in the First Degree; and also you must apply the facts to the defendant's plea of self defense.

* * *

Opposition

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No. 81-742

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

ERNEST DONALD SUGGS,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

BRIEF OF RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the question of petitioner's being denied due process due to the Trial Court's oral charge on self-defense is within the jurisdiction of the Supreme Court where this issue was not presented to the highest court of the State and was not reviewed.

2. Whether in Alabama is the burden of proof ever upon a defendant to prove self-defense and did the Trial Court's oral charge create such an impression denying the Petitioner due process of law.

3. Whether the question of petitioner's being denied due process due to the failure of the prosecution to turn over a medical report allegedly violating the principles of Brady v. Maryland is within the jurisdiction of the Supreme Court where this issue was not properly presented to the highest court of the State and was not re-

viewed.

4. Whether the petitioner was denied due process of law due to the failure of the prosecution after an improper request to turn over a medical report of someone other than the victim in this case which contained no exculpatory evidence for the Petitioner.

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OPINIONS BELOW

The Opinion of the Court of Criminal Appeals of Alabama is published at 403 So. 2d 309 (1981). The Alabama Supreme Court denied the petition for writ of certiorari without opinion at 403 So. 2d 313 (1981).

JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. §1257. It is respondent's position that this Court is without jurisdiction to consider the issues presented since these issues were never properly presented to the highest court of the State and were not expressly passed on by the Alabama Supreme Court.

STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> "Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the

equal protection of the laws."

28 U.S.C. §1257 states:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari... where any title, right, privilege or immunity is specially set up or claimed under the Constitution..."

Rule 39(k), Alabama Rules of Appellate Procedure, states:

> Scope of review. The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals. If the petitioner is not satisfied with that statement of facts, he may, on application for rehearing in that court, present any additional or corrected statement of facts and request that court to add or correct those facts in its opinion on rehearing. If the court fails to accede to the request, petitioner may copy the statement in the petition to this court, with references therein to the pertinent portions of the clerk's record and reporter's transcript, and it

will be considered along with the statement of facts in the opinion of the appellate court, if found to be correct.

STATEMENT OF THE CASE

Petitioner, Ernest Donald Suggs, was indicted for murder by the Grand Jury of Calhoun County, Alabama. He pleaded not guilty. His trial began on February 12, 1979, in the Seventh Judicial Circuit of Alabama. On February 15, 1979, the jury found him guilty and sentenced him to life imprisonment. He gave notice of appeal to the Alabama Court of Criminal Appeals and filed a motion for new trial, which was amended on several occasions. This motion was denied on July 18, 1979 (App. p. 11). On May 5, 1981, in an opinion consisting primarily of a recitation of the Trial Court's decision, the Alabama Court of Criminal Appeals affirmed petitioner's conviction. The opinion of the Alabama Court of Criminal Appeals did not address any issue regarding the Trial Court's oral charge or the prosecution's failure

to produce the medical report of a witness. Petitioner then filed a motion for rehearing, which was denied on June 23, 1981. He next filed a petition for a writ of certiorari in the Alabama Supreme Court on July 7, 1981. The Petitioner in his petition for writ of certiorari did not assert that he used Rule 39(k), Alabama Rules of Appellate Procedure, to bring the Trial Court's oral charge or the failure of the prosecution to produce the medical report of a witness to the Court of Criminal Appeals' attention on rehearing. That petition was denied on August 21, 1981.

REASONS FOR DENIAL OF THE WRIT

1. THE SUPREME COURT HAS NO JURISDICTION TO REVIEW ISSUE OF THE TRIAL COURT'S ORAL CHARGE WHICH WAS NOT PROPERLY PRESENTED AND REVIEWED BY THE STATE'S HIGHEST COURT.

On May 5, 1981, the Alabama Court of Criminal Appeals affirmed the Petitioner's conviction without addressing the issue of

whether the Trial Court's oral charge on self-defense was incorrect. Then, on July 7, 1981, when the Petitioner filed his petition for writ of certiorari before the Alabama Supreme Court he neglected to state that he had used Rule 39(k), Alabama Rules of Appellate Procedure, to bring the Trial Court's oral charge to the Court of Criminal Appeals' attention on rehearing.

Since review of the Supreme Court of Alabama is limited to the facts stated in the opinion of the Court of Criminal Appeals unless on rehearing a Rule 39(k) motion is used to present an additional or corrected statement of facts, the Alabama Supreme Court did not have the power to address this issue. Rule 39(k), Alabama Rules of Appellate Procedure.

In Street v. New York, 394 U.S. 576 (1969), it was held that if a question is not presented to the State courts in such a manner that it is decided by the highest

court of the State when it affirms the conviction, then the Supreme Court has no power to consider the matter.

In Michigan v. Tyler, 436 U.S. 499 (1978), the Supreme Court held that the failure of a litigant to follow proper procedure resulting in the refusal of a State Court to consider a question, constitutes adequate grounds for barring review in the U.S. Supreme Court so long as the State has a legitimate interest in enforcing its procedural rule.

Therefore, since the Alabama Supreme Court could not review the Trial Court's oral charge, there is no jurisdiction for this Court to review this issue either.

2. IN ALABAMA THE BURDEN OF PROOF IS NEVER UPON A DEFENDANT TO PROVE SELF-DEFENSE AND THE TRIAL COURT'S ORAL CHARGE DID NOT CREATE THIS IMPRESSION.

In Alabama the burden is never upon the defendant to prove self-defense. In any homicide case in which there is evi-

dence of self-defense, the burden is upon the State to satisfy the jury by the evidence beyond a reasonable doubt that the defendant is guilty, and this burden is not shifted from the State to defendant by reason of applicability to the particular case of the defense of self-defense or defense of another. Howard v. State, 390 So. 2d 1070, 1072 (Ala. Cr. App.), writ denied 390 So. 2d 1077 (Ala. 1980).

Moreover, as stated in the Trial Court's oral charge, the defendant only has the duty of producing some evidence of self-defense and he need not even offer any evidence of self-defense if the evidence offered by the State showing murder also supplies such evidence. (Petitioner's Appendix page 14). Therefore, the present case is unlike Holloway v. McElroy, 632 F. 2d 605 (5th Cir. 1980), wherein a Georgia State Court had instructed the jury that the presumption of innocence was removed

and burden of proving self-defense was on the slayer once an intentional homicide had been proven. 632 F. 2d at 619.

3. THE SUPREME COURT HAS NO JURISDICTION TO REVIEW THE ISSUE OF WHETHER MEDICAL RECORDS OF A WITNESS SHOULD BE PRODUCED FOR THE DEFENSE WHERE SUCH ISSUE WAS NOT PROPERLY PRESENTED AND REVIEWED BY THE STATE'S HIGHEST COURT.

On May 5, 1981, the Alabama Court of Criminal Appeals affirmed the Petitioner's conviction without addressing the issue of whether the prosecution should have produced the medical records of a witnes, Kathy Robb. Then, on July 7, 1981, when the Petitioner filed his petition for writ of certiorari before the Alabama Supreme Court, he neglected to state or to show that he had used Rule 39(k), Alabama Rules of Appellate Procedure, to bring the facts surrounding the medical records of this witness to the Court of Criminal Appeals' attention on rehearing.

Since review of the Supreme Court of Alabama is limited to the facts stated in the opinion of the Court of Criminal Appeals unless on rehearing a Rule 39(k) motion is used to present an additional or corrected statement of facts, the Alabama Supreme Court did not have the power to address this issue. Rule 39(k), Alabama Rules of Appellate Procedure.

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review in the U.S. Supreme Court so long as the State has a legitimate interest in enforcing its procedural rule.

Therefore, since the Alabama Supreme Court could not review the issue of whether the medical records of Kathy Robb should have been produced, there is no jurisdiction for this Court to review this issue either.

4. THE PETITIONER WAS NOT DENIED DUE PROCESS OF LAW DUE TO THE FAILURE OF THE PROSECUTION, AFTER AN IMPROPER REQUEST, TO TURN OVER THE MEDICAL RECORDS OF A WITNESS WHICH DID NOT CONTAIN EXCULPATORY MATERIAL.

Initially, it should be noted that the Petitioner's attorneys filed a motion to produce prior to trial for any matter or information which is or may be used as evidence in this case, (i.e., murder in the first degree of Leslie Hakes), (R.629). There has never been a showing that the medical records on Kathy Robb, a witness to this crime, was ever considered as evidence in this case by the State. Moreover,

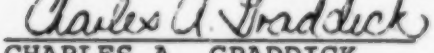
motions to produce of this type are deemed to be "fishing expeditions" and are considered improper. Giddens v. State, 333 So. 2d 615 (Ala. Cr. App. 1976); Thigpen v. State, 49 Ala. App. 233, 270 So. 2d 666 (1972).

Nevertheless, the medical records of Kathy Robb are not exculpatory matter. The Petitioner mentions Robb's guilt feelings about the incident. However, the psychiatric report says it is important to note that these feelings were indicative of the "survivor syndrome", i.e., that she is alive while her boyfriend is dead and this does not indicate in any way that she lied to the police or jury (Defendant's Exhibit A - Motion for New Trial). The other factor mentioned was the powder burns found on Robb's cheeks. Again, this does not impeach Robb's testimony since she does not remember when she was shot in the earlobe (R. 80-81).

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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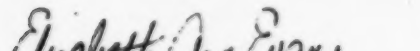

ELIZABETH ANN EVANS
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CERTIFICATE OF SERVICE

I, Elizabeth Ann Evans, an Assistant Attorney General of Alabama and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 8th day of January, 1982, I did serve the three copies of the foregoing on the Attorney for Ernest Donald Suggs, Petitioner, by mailing same to him, first class postage prepaid and addressed as follows:

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Petitioner's Reply Brief

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No. 81-742

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October Term, 1981

ERNEST DONALD SUGGS,
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v.

STATE OF ALABAMA,
Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257

Respondent has argued that this Court has no jurisdiction based on overly strict interpretation of Rule 39 (k), Alabama Rules of Appellate Procedure, and a footnote in *Michigan v. Tyler*, 436 U.S. 499, 512 n. 7 (1978). Respondent has misconstrued both Rule 39 (k) and the standard for determining whether this Court has jurisdiction under 28 U.S.C. § 1257.

First, Rule 39 (k), Alabama Rules of Appellate Procedure is not an absolute prohibition against the Supreme Court of Alabama looking to the record for facts not in-

cluded in the opinion of the Alabama Court of Criminal Appeals. The Rule merely states that "[t]he review . . . will *ordinarily* be limited. . . ." (emp. supp.) The Committee Comments to Rule 39 also state that the Rule is not absolute.

> The scope of review is generally that which is now used and with which the Bar is familiar. This includes . . . the rules that in many instances, this court can go to the record for a more complete understanding of those features treated in the opinion of a court of appeals. See cases cited in both the opinion and concurring opinion. *Johnson v. State,* 287 Ala. 576, 253 So. 2d 344, and this action of the court may be ex mero motu, *Wilbanks v. State,* 289 Ala. 171, 266 So.2d 632.

Alabama Rules of Court at 446-47 (1979 Desk Copy). Also, Rule 1, Alabama Rules of Appellate Procedure, states that the Rules "shall be construed so as to assure the just, speedy and inexpensive determination of every appellate proceeding on its merits." To accept respondent's overly strict construct of Rule 39 (k) would deny petitioner a just determination on the merits.

Furthermore, "[t]he issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *Street v. New York,* 394 U.S. 576, 583 (1969). In *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928), quoted in *Street v. New York supra* at 584, this Court described the proper standard for determining whether a federal question has been properly raised as follows:

> No particular form of words or phrases is essential, but only that the claim . . . and the ground therefor be brought to the attention of the state court with fair precision and in due time.

As soon as petitioner discovered that the State had failed or refused to disclose the medical report containing exculpatory information, petitioner brought the matter to the trial court's attention in the motion for a new trial. Petitioner briefed this issue to the Alabama Court of Criminal Appeals (Brief of Appellant, at 6, 30-31). Petitioner then briefed the issue to the Alabama Supreme Court (Brief of Petitioner, at 30-31).

Likewise, petitioner briefed the issue of the constitutionality of the portion of the jury charge on self-defense to the Alabama Supreme Court. In fact, most of the first full paragraph on page five of the petition for certiorari is taken verbatim from a paragraph on page 40 of petitioner's brief to the Alabama Supreme Court.

In summary, it must be concluded that petitioner has brought the federal question to the attention of the state court with fair precision and in due time.

II. THE STATE OF ALABAMA IS SUBVERTING THE PURPOSES OF *BRADY V. MARYLAND*

At the trial, the State's only eye witness testified that she recalled being hit by one bullet — in the buttocks as she was running away from petitioner (Tr. 80). Yet the medical report in question shows that there were powder burns on her face (Tr. 727R), indicating a shot from close range. The existence of the powder burns is consistent with petitioner's testimony that the gun or guns were fired during the scuffle which ensued as the witness' boyfriend (the deceased) attacked petitioner as petitioner and the witness were "behaving amorously" and all parties were in close contact (Tr. 248-49). Thus, the medical report tends to support the testimony of petitioner and to undermine that of the State's key witness. The report also undermines the witness' credibility and memory of the event, which was at

best questionable since all parties had been drinking heavily (Tr. 91) and smoking marijuana (Tr. 242).

The State's argument that the medical report does not come within the bounds of *Brady,* is consistent with the cavalier approach which most District Attorneys in Alabama take to "*Brady* Requests" and which the Alabama Court of Criminal Appeals has allowed to continue. The decisions cited by the State (*Giddens v. State,* 333 So.2d 615 (Ala. Cr. App. 1976); *Thigpen v. State,* 49 Ala. App. 233, 270 So.2d 666 (1972)) and others (e.g., *Hurst v. State,* 54 Ala. App. 254, 307 So.2d 62 (1974)) indicate that the accepted response of an Alabama District Attorney to a *Brady* Request is to furnish a copy of any statement made by the defendant. Such an accepted response is inconsistent with the holding of *Brady, supra* at 87.

III. THE TRIAL COURT'S JURY INSTRUCTION COULD HAVE LEFT THE IMPRESSION THAT THE BURDEN OF PERSUASION ON THE ISSUE OF SELF-DEFENSE IS ON THE PETITIONER

Based on *Howard v. State,* 390 So.2d 1070 (Ala. Cr. App.) *writ denied* 390 So.2d 1077 (Ala. 1980) and the cases cited therein, the law in Alabama, as in Georgia, is that once a defendant presents evidence on the issue of self defense, the burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self-defense. Therefore, *Holloway v. McElroy,* 632 F.2d 605 (5th Cir. 1980), *cert. denied,* ..... U.S. ....., 49 U.S.L.W. 3881 (1981) applies in Alabama, just as it does in Georgia.

However, *Howard* and the cases cited therein indicate an ambivalence about the burden of proof on self-defense: they say that the burden is on the State to prove beyond a reasonable doubt that a defendant did not act in self-defense,

but they also say that the trial court cannot tell this to the jury in plain terms. It is this ambivalence which leads a Trial Court to say to the jury that "it is never presumed that an unlawful homicide is committed in the right of self-defense. . . ." (App. 14), and this ambivalence can lead a jury to conclude that the burden is on the defendant. Of course, the Trial Court decides whether an issue goes to the jury. Once the Courts allows the issue of self-defense to go to the jury, it must say in plain and unambivalent terms that the burden of proof on the issue of self-defense is on the State. Otherwise, as described in *Holloway*, the defendant's right to due process is violated.

Respectfully submitted,

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